Filed 3/19/09 In re H.A. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re H.A., a Person Coming Under the Juvenile Court Law.	B210311 (Los Angeles County Super. Ct. No. CK31486)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. W.A., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Stephen Marpet, Juvenile Court Referee. Affirmed.

Donna Balderston Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

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W.A. (Father) appeals from a June 25, 2008 order terminating parental rights to his daughter, H.A., born in December 2003, and referring her for adoption by a paternal cousin. We affirm the order because substantial evidence supports the juvenile court's finding that the beneficial relationship exception to termination of parental rights (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i)) did not apply.[1]

BACKGROUND

Father and D.B. (Mother) were neighbors and shared responsibility for taking care of H.A. When Mother tested positive for methamphetamine in December 2005, Mother and Father agreed to a voluntary family maintenance contract and to drug testing.[2] Father, who had a criminal record involving drug possession, tested positive for methamphetamine in January 2006. H.A. was detained and placed with her paternal great grandmother and great aunt. Father denied using drugs and told the Los Angeles County Department of Children and Family Services (DCFS) that he had taken Sudafed, but, according to DCFS, Sudafed could not create a false positive test.

H.A. was declared a dependent of the juvenile court under section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling), based on, among other things, Father's periodic use of amphetamine and methamphetamine. Father was afforded reunification services and monitored visitation.

In September 2006, the court found Father in compliance with the case plan and ordered unmonitored and weekend overnight visits; DCFS had discretion to allow Father to move into the paternal great grandmother's home. DCFS reported that Father had a close bond with H.A. and she sometimes cried at night, demanding Father, who would talk to H.A. on the telephone and calm her. After completing 47 of 48 sessions of his drug treatment program, Father was terminated from the program after failing to submit to a drug screen and then failing to contact the program to enroll in the relapse program.

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[1] Unspecified statutory references are to the Welfare and Institutions Code.

[2] Mother had a history of drug abuse. Mother failed to reunify with H.A.'s three older half-siblings, who were adopted by maternal relatives.

Father was reinstated into the program in November 2006. The court ordered that Father's visits were to be unmonitored day visits, with discretion for DCFS to liberalize the visits to overnight and weekends.

In April 2007, the court allowed Father to live with his great grandmother and great aunt, conditioned on his compliance with the case plan and clean drug tests. In June 2007, Father completed his drug program. DCFS reported that Father was in compliance with his program, had a strong bond with H.A., and H.A. stated that she loved Father and was happy living with him. The court made an order on July 31, 2007, permitting Father to live in the caretakers' home with H.A. under DCFS supervision.

A week later, Father tested positive for methamphetamine. Father at first denied drug use but then admitted to having had "'2 smokes.'" H.A. was detained in September 2007 and placed with the paternal great grandmother and great aunt after Father moved out of their home, which the court had ordered him to do. In October 2007, the court sustained a supplemental petition based on Father's positive drug test in August 2007. The court terminated Father's reunification services and set a section 366.26 hearing.

Although the paternal great grandmother and great aunt were willing to adopt H.A., DCFS had concerns about their abilities to parent her in the long term. According to an October 2007 adoption assessment, the paternal great aunt agreed to pursue adoption of H.A. as a single applicant.

The paternal great aunt's home study was *not* approved. In January 2008, H.A. told DCFS that Father was living with her. Other relatives confirmed that Father was living in the home in violation of the court order. After a February 2008 team decision-making meeting to consider other relatives for adoption, H.A. was placed with a paternal cousin on March 3, 2008. In April 2008, DCFS reported that the paternal cousin's home study was expected to be approved and that H.A. "has made good progress since the replacement and is responding very positively to [the paternal cousin's] loving care and nurturing environment she is providing."

At his request, Father was provided with random drug testing referrals but did not appear for any testing from April to June 2008. During that period, he had only one

monitored visit with H.A. in May 2008. At the visit, H.A. was happy to see Father and appeared to enjoy her interaction with him.

The permanency plan hearing was held in June 2008. Father testified that beginning in January 2006, he would see H.A. during the day on a daily basis; he would play with her and teach her things. He believed he had been a "very good father to [H.A.]" After H.A. was placed with her paternal cousin in March 2008, Father had only one monitored visit with her. According to Father, he was told by a DCFS social worker that he could not see H.A. until after the court date. But in May 2008, he began to speak with H.A. by telephone once or twice a week. Father denied living in the great grandmother's home but admitted that he would visit the home all day from September 2007 to March 3, 2008.

The paternal cousin and prospective adoptive parent testified that in the three and one-half months that H.A. had been in her care, Father telephoned and spoke with H.A. four or five times, each call lasting from five to 15 minutes. H.A. had the choice of telephoning Father once a week, and H.A. chose not to telephone Father on at least one occasion. The paternal cousin monitored Father's May 2008 visit, which lasted one hour. H.A. was excited to see Father and ran to him and hugged him. At the end of the visit, the paternal great grandmother, the great aunt and H.A. held onto each other, crying and making the separation difficult. Father walked away, attempting to get the grandmother and aunt to leave H.A. As the paternal cousin took H.A. home through the parking lot, H.A. screamed the great aunt's name; H.A. did not call out to Father.

In the opinion of the paternal cousin, H.A. was not being properly cared for in the great grandmother's home. The paternal cousin had watched H.A. "grow up from a baby" and "knew what was going on in both houses [the homes of the maternal great grandmother and the grandmother]." The cousin stated that there was a lot of yelling in the great grandmother's house and H.A. was not bathed or clothed properly. The paternal cousin said that H.A. spoke of both positive and negative memories of living with the great grandmother. When the cousin was asked whether she would permit H.A. to visit other paternal relatives if H.A. was placed with her on a permanent basis, she responded,

"I would have to say it would have to go through the same both ways. I honestly don't think that family can offer [H.A.] what she needs to be offered."

In argument, Father's counsel urged the application of the beneficial relationship exception to termination of parental rights. The juvenile court rejected the exception and terminated parental rights. The court explained: "[I]n my 11 years of doing this, this is one of the more difficult hearings that I ever had where I have to deal with whether I should terminate [parental rights]. [¶] There is no question that this father for a significant period of time of this child's life has been involved. He's gone over and had visits. [¶] What bothers me and concerns me is that I'm dealing with the law and how Father has acted since this case. . . . [¶] . . . The child was detained from Mother and Father during a V.F.M. [voluntary family maintenance contract]. He actually had the child in his care and custody and tested positive within a month of having the child in his care. Then we filed a petition, and Father ultimately got the child back and within a month again tested positive for methamphetamine. [¶] So this happened twice. . . . [¶] . . . [¶] In January 2006 you tested positive, and the department filed. The second time you tested positive was after you got the child back again. So the history is twice you've had the child in your care and custody. Within a month you've tested positive . . . . [¶] . . . The law says I have to look to two prongs. [¶] First establish that you have maintained regular contact and visits. I think you have compliance with that except for the brief period in March, which is a significant period, but I have to look at the total picture, and I think overall you've had that contact, but you must establish now that the benefit to this child maintaining the relationship with you outweighs the benefit of an adoption. It's a balancing act. That's what I got to do."

The court concluded: " I don't find that there is a benefit to maintaining this parent-child relationship. This child has had monitored visits with you for the last year, and right now she's in a home that is safe, and I must tell you this caretaker's testimony was very enlightening to me. She was honest, open, candid and has a very good handle on the dynamics of the family relationship to the extent she made hard decisions about whether or not this child was being well taken care of. [¶] She could not do certain

things when she took this child into her care in March where she was living with a grandmother and not obviously doing the right thing as a parent. I just cannot make a finding today that you've established that . . . [¶] . . . benefit, and there's no [section 366.26, subdivision (c)(1)(B)(i)] exception. [¶] I'm also finding that by clear and convincing evidence it's likely this child is going to be adopted . . . ."

At the conclusion of the hearing, Father's counsel asked the juvenile court about the issue of post-adoption visitation. The juvenile court stated that the social worker would talk to the paternal cousin about the issue. Father's counsel responded, "That's all I'm asking."

DISCUSSION

Section 366.26, subdivision (c)(1)(B)(i) affords an exception to termination of parental rights if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H*. (1994) 27 Cal.App.4th 567, 575.) The existence of a beneficial relationship is determined by considering the age of the child, the amount of time the child spent in the parent's custody, the positive or negative effect of interaction between the parent and the child, and the child's particular needs. (*In re Amber M*. (2002) 103 Cal.App.4th 681, 689.) Neither a loving relationship (*In re Jeremy S*. (2001) 89 Cal.App.4th 514, 523) nor the derivation of some benefit from continued parental contact (*In re Angel B*. (2002) 97 Cal.App.4th 454, 466) is enough to establish this exception. The parent has the burden of establishing this exception. (*In re Lorenzo C*. (1997) 54 Cal.App.4th 1330, 1343.) We review the juvenile court's order under the traditional substantial evidence standard. (*In re Christopher L*. (2006) 143 Cal.App.4th 1326, 1333.)

In his opening brief, Father claims the adoption assessment (prepared before H.A.'s placement with the paternal cousin) was inadequate in failing to address the effect

on H.A. of "the loss of the relationship she had with Father." In his reply brief, Father faults the juvenile court for failing to order a bonding study.

As Father did not object below to the adequacy of the adoption assessment or the lack of a bonding study, he cannot make these challenges on appeal. (*In re Urayna L.* (1999) 75 Cal.App.4th 883, 886 [waiver of issue of adequacy of adoption assessment].) Although "a parent may waive the objection that an adoption assessment does not comply with the requirements provided in section 366.21, subdivision (i), a claim that there was insufficient evidence . . . at a contested hearing is not waived by failure to argue the issue in the juvenile court." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623.) Thus, our conclusion that Father forfeited his challenges to the adequacy of the adoption assessment or to the lack of a bonding study does not deprive him of his challenge to the sufficiency of the evidence regarding the juvenile court's rejection of the beneficial relationship exception.

Father maintains that *In re Valerie W.* (2008) 162 Cal.App.4th 1 (*Valerie W.*) supports his argument that the forfeiture doctrine should not apply here and that the deficiencies in the assessment report were sufficiently egregious so as to undermine the juvenile court's decision. In *Valerie W.*, the Court of Appeal reversed an order terminating parental rights on the ground that there was insufficient evidence of adoptability. (*Id.* at p. 15.) The court there found that the "deficiencies in the assessment report were significantly egregious to undermine the basis of the court's decision." (*Ibid.*)

Valerie W. is distinguishable. First, the father in *Valerie W.* indeed *did challenge* the assessment's adequacy in the juvenile court, and therefore the agency did not raise the issue of forfeiture on appeal. (*Valerie W.*, *supra*, 162 Cal.App.4th at p. 7.) Second, *Valerie W.* involved the issue of adoptability, which the agency had the burden of establishing (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1317), unlike the instant situation, where Father had the burden of establishing the beneficial relationship exception.

A good part of Father's briefs is devoted to arguments that information about H.A.'s emotional state and the impact on her of the termination of parental rights was

lacking in the adoption assessment and other reports admitted into evidence in the juvenile court. These arguments are improper attempts to shift the burden to DCFS when it was Father who had the burden of establishing the beneficial relationship exception in the juvenile court. Accordingly, these arguments do not establish that the totality of the evidence that was before the juvenile court was insufficient to support the juvenile court's finding that Father failed to establish the beneficial relationship exception.

We conclude that there is sufficient evidence to support the juvenile court's finding that Father failed to show that H.A.'s well-being would be promoted more by a continuation of the parent-child relationship in a tenuous placement than by adoption. The juvenile court reasonably gave credence to evidence that H.A. had adapted well to her paternal cousin's home, that the home was loving and stable, that H.A. was not suffering emotionally or psychologically from the move to the paternal cousin's home, and that the stability and love of that nurturing environment best met the needs of H.A., who was then four years old. Father had not yet proven that he could maintain a stable, drug-free lifestyle for an extended period of time and had regressed to monitored visitation after H.A. was detained in September 2007. The juvenile court reasonably concluded that, given H.A.'s young age, the stability and permanence of an adoptive home would promote her well-being more than a continuation of the parent-child relationship in a less stable placement.

Father offers no legal authority for his argument that the juvenile court erred in considering the quality of H.A.'s care when she was living with Father and the paternal great grandmother and great aunt, so we determine the point to be without merit.

As Father fails to persuade us that the evidence was insufficient to support the juvenile court's rejection of the beneficial relationship exception to termination of parental rights, we affirm the order.

DISPOSITION

The June 25, 2008 order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

TUCKER, J.*

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.